APPENDIX

TABLE OF CONTENTS

Appendix A: Summary Order, United States Court of Appeals for the Second Circuit, filed February 18, 2010 . 1a

Appendix B: Judgment, United States District Court for the Southern District of New York, filed July 29, 2008 . . 8a

Appendix C: Memorandum Opinion and Order, United States District Court for the Southern District of New York, filed July 28, 2008 . 10a

Appendix D: Judgment, United States District Court for the Southern District of New York, filed January 4, 2006 . . . . . 14a

Appendix E: Opinion and Order, United States District Court for the Southern District of New York, filed October 31, 2005 . . . . . 17a

Appendix F: Opinion, United States District Court for the Southern District of New York, filed January 7, 2005 . . . . . 28a

Appendix G: Fed. R. Civ. P. 4 . . . . . 48a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 08-4908-cv

[Filed February 18, 2010]

DEF,

Defendant,

RONALD L. WOLFSON,
JORGE GALLO QUINTERO,

Defendants-Appellants,

PARAGUAY HUMANITARIAN FOUNDATION, INC., formerly known as CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., and JOSE M. AVILA,

Defendants-Counterclaimants-Third Party Plaintiffs-Appellants,

v.

ABC,

Plaintiff,

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of BANCO UNION S.A.E.C.A. in liquidation and BANCO ORIENTAL S.A.I.F.E.C.A. in liquidation,

Plaintiffs-Counter-Defendants-Third Party Defendants-Appellees,

JOHN W. TULAC,

Nominal Defendant,

CITIBANK, N.A.,

Garnishee.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 18th day of February, two thousand ten.

Present:

ROBERT D. SACK,
ROBERT A. KATZMANN,
Circuit Judges,
RICHARD J. SULLIVAN,
*District Judge.**

Appeal from the United States District Court for the Southern District of New York (Keenan, *J.*).

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court be and hereby is **AFFIRMED**.

This case arises out of the transfer of sixteen million dollars from two Paraguayan banks in liquidation to bank accounts in the United States. Plaintiff Banco Central Del Paraguay ("Banco Central") brings an action for conversion as assignee of Banco Union and Banco Oriental, the two Paraguayan banks in liquidation. The district court granted summary judgment in favor of Banco Central on its conversion claim and dismissed defendants' counterclaims and third party complaint. Defendants Ronald L. Wolfson, Jorge Ralph Gallo Quintero,

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*The Honorable Richard J. Sullivan, United States District Judge for the Southern District of New York, sitting by designation.

Paraguayan Humanitarian Foundation, CQZ Holding Corp., Avijos, Inc., and Jose M. Avila now appeal. We assume the parties' familiarity with the facts and procedural history of the case.

Defendants challenge Banco Central's standing to bring this action. Defendants argue that the assignments through which Banco Union and Banco Oriental assigned their claim are invalid under Paraguayan law. Therefore, according to defendants, Banco Central does not have a legal interest in the claim and does not have standing to bring suit. *See W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108 (2d Cir. 2008) ("[T]he minimum requirement for an injury-in-fact is that the plaintiff have legal title to, or a proprietary interest in, the claim."). Defendants point to the declaration of Alfredo Enrique Kronawetter, a Paraguayan lawyer, for the proposition that the assignments are invalid. The district court did not consider the Kronawetter declaration because it was submitted four months after the close of briefing.

We have reviewed the Kronawetter declaration and conclude that it is insufficient to raise a genuine issue of material fact in dispute that would preclude summary judgment. As evidence of the assignments, Banco Central submitted the actual assignments, Joint Appendix ("JA") at 265-68, as well as subsequent ratifications of the assignments by the liquidators and declarations of the liquidators expressing support for the lawsuit. JA 385-87, 435-51, 453-54. The Kronawetter declaration states that the assignments "do not combine the necessary formalities and conditions so that such means are effective, for not having had it carried out under the decree of article

389 of the Paraguayan Civil Code." JA 676. This statement is entirely conclusory and defendants do not even provide the Court with a copy of article 389 or any explanation of why the assignments do not comply with Paraguayan legal formalities. Defendants therefore fail to raise a genuine issue of material fact in dispute precluding summary judgment.

Defendants argue that the district court erred when it granted summary judgment on Banco Central's conversion claim because a conversion claim may not be predicated on a mere breach of contract. But Banco Central's claim is not predicated on a mere breach of contract. Instead, it "spring[s] from circumstances extraneous to, and not constituting elements of, the [alleged] contract . . . ." *See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987); *see also In re September 11 Litig.*, 640 F. Supp. 2d 323, 338 (S.D.N.Y. 2009) ("[C]ontract and tort claims for relief may coexist in limited circumstances . . . when a defendant's tortious conduct is separate and apart from its failure to fulfill its contractual obligations.") (internal quotation marks and alterations omitted). Here, Banco Central's claim is not predicated on the alleged contract. Banco Central does not ask for the "profits of the investment," nor does it ask for the return of its money because the investment plan was not carried out. JA 206. Instead, Banco Central demands the return of the sixteen million dollars because the money was unlawfully transferred out of Paraguay.

Defendants further contend that the district court erred when it dismissed defendants' counterclaims and third party complaint. Defendants brought counterclaims against Banco Central for interference

with a contract and against the banks-in-liquidation for breach of contract. The district court correctly dismissed these claims pursuant to the "opposing party" requirement of Federal Rule of Civil Procedure 13. Banco Central is not an "opposing party" because the interference with a contract claim is brought against Banco Central in its regulatory capacity and not in its capacity as assignee of the two banks-in-liquidation. *See Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885 (2d Cir. 1981) (holding that generally, under the "opposing party" requirement, "when a plaintiff has brought suit in one capacity, the defendant may not counterclaim against [the plaintiff] in another capacity"). The banks-in-liquidation, which are not named parties, are not "opposing part[ies]" because they have assigned their claims and so they are not the real parties in interest in the litigation nor the parties controlling the litigation. *See Banco Nacional de Cuba v. First Nat'l City Bank of N.Y.*, 478 F.2d 191, 193 (2d Cir. 1973) (concluding that a counterclaim could be brought against the Republic of Cuba, though unnamed, because the Republic of Cuba and Banco Nacional de Cuba, the plaintiff, acted as a single entity); *see also Transamerica Occidental Life Ins. Co. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 392 (3d Cir. 2002) (concluding that an assignee was an "opposing party," stating that "[i]t is significant that the [assignee] . . . was actually the party controlling the litigation in both actions . . . . This is an essential component of our analysis.").

Defendants' third-party complaint against the banks-in-liquidation was also correctly dismissed. Defendants waited two years before attempting to serve process on the banks-in-liquidation and never

successfully served process on them. We have previously held inapplicable the foreign country exception to Federal Rule of Civil Procedure 4(m)'s 120-day time limit for service where a party did not attempt service within the 120-day limit and "ha[d] not exactly bent over backward to effect service." *Montalbano v. Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985). Likewise we do not find that the district court abused its discretion here where defendants waited two and a half years to attempt service, never effected service, and did not explain why they had not been able to effect service. *See Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007) ("We review for abuse of discretion a district court's dismissal of an action for failure to timely serve the defendant.").

We have considered the remainder of defendants' arguments and conclude that they lack merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed July 29, 2008]

BANCO CENTRAL DEL PARAGUAY, et al.
Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC., et al.,
Defendants.

[Rule 54(6)]
JUDGMENT

Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable John F. Keenan, United States District Judge, and the Court, on July 28, 2008, having rendered its Memorandum Opinion and Order that there is no just reason for delay, pursuant to Fed. R. Civ. 54(b), directing the Clerk of the Court to enter final judgment with respect to the Court's granting of summary judgment with respect to Count I of the amended complaint and denying the principal

defendants application to have Counts II and III dismissed with prejudice, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum Opinion and Order dated July 28, 2008, there is no just reason for delay, pursuant to Fed. R. Civ. 54(b), final judgment is entered with respect to the Court's grant of summary judgment with respect to Count I of the amended complaint and the principal defendants application to have Counts I and III dismissed with prejudice is denied.

Dated: New York, New York
July 29, 2008

J. MICHAEL McMAHON

Clerk of Court

BY: /s/

Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

01 Civ. 9649 (JFK)

[Filed July 28, 2008]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants.

MEMORANDUM OPINION and ORDER

JOHN F. KEENAN, United States District Judge:

By Order dated January 4, 2006, the Court entered partial summary judgment in favor of Plaintiff Banco Central de Paraguay ("Banco Central" or "Plaintiff") on Banco Central's claim of conversion (Count I of Banco Central's Amended Complaint). By Order dated November 29, 2006, the Court granted Banco Central's motion to dismiss its remaining claims (Counts II and III of the Amended Complaint) without prejudice. On September 5, 2007, the Court denied Principal Defendants' "Motion for a New Trial Under FRCP 59," by which the Principal Defendants sought to overturn the Court's grant of summary judgment on Count I. Principal Defendants subsequently filed a Notice of Appeal from various prior Orders of this Court.

On January 11, 2008, however, the parties stipulated that Principal Defendants' appeal must be withdrawn as premature, in light of the fact that Counts II and III were dismissed without prejudice. *See Chappelle v. Beacon Communications Corp.*,84 F.3d 652, 654 (2d Cir. 1996). The stipulation provided that Principal Defendants would not be precluded from appealing a final judgment or from a grant of certification of the judgment as final, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. Principal Defendants now move the court to direct an entry of final judgment as to Count I, pursuant to Rule 54(b). Principal Defendants also ask that the Court require Plaintiff to "fully and finally abandon" Counts II and III and dismiss those counts with prejudice.

Rule 54(b) provides, in relevant part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the

> entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Three factors govern the applicability of Rule 54(b): (i) whether multiple, separate claims exist, (ii) whether one of them has been finally determined, and (iii) whether there is no just reason for delay of an appeal. Even if these conditions are met, discretion to order Rule 54(b) certification remains with the district court. *Shrader v. Granninger*, 870 F.2d 874, 877 (2d Cir. 1989). Here, all three factors weigh in favor of certification under Rule 54(b). First, there are multiple claims. Second, Count I has been "finally determined" by the Court's grant of summary judgment on that count in Plaintiff's favor. Third, there is no just reason for delay of an appeal: the without-prejudice voluntary dismissal of the remaining claims has rendered those claims essentially dormant. Further, Banco Centrale does not oppose the entry of final judgment as to Count I pursuant to Rule 54(b). Accordingly, the Court in its discretion grants Rule 54(b) certification with respect to the grant of summary judgment in Banco Centrale's favor on Count I.

Plaintiff opposes, however, Principal Defendants' request that the Court direct Counts II and III to be dismissed with prejudice. Plaintiff correctly notes that there is no basis for Principal Defendants' application. The Court's Memorandum Opinion and Order of November 29, 2006, granted Plaintiff's motion for voluntary dismissal of the remaining claims *without prejudice* and explained at considerable length the reasoning behind the decision. *See Banco Centrale de*

Paraguay v. Paraguay Humanitarian Foundation, Inc., No. 01 Civ. 9649 (JFK), 2006 U.S. Dist. LEXIS 87093 (S.D.N.Y. Nov. 29, 2006). Banco Centrale has offered no good reason why the Court should now overturn its prior Order.

Because there is no just reason for delay, pursuant to Rule 54(b), the clerk is directed to enter final judgment with respect to the Court's grant of summary judgment in Plaintiff's favor with respect to Count I of the Amended Complaint. Principal Defendant's application to have Counts II and III dismissed with prejudice is denied.

SO ORDERED.

Dated: New York, New York
July 28, 2008

/s/John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed January 4, 2006]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants,

-and-

JOHN W. TULAC,

Nominal Defendant.

JUDGMENT

This diversity action having come before the Court upon the filing of Plaintiff's Complaint on November 1, 2001; and the Court having granted Plaintiff summary judgment as to the principal defendants on Count I of Plaintiff's Amended Complaint and denied all other motions for summary judgment in an Opinion dated January 6, 2005; and the Court having dismissed Principal Defendants' counterclaim with prejudice and Principal Defendants' third-party complaint without prejudice in an Opinion and Order dated October 31, 2005; it is now ORDERED, ADJUDGED and DECREED as follows:

1. Plaintiff shall recover from Principal Defendants Paraguay Humanitarian Foundation, Inc., f/k/a CQZ Humanitarian Foundation, Inc., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson and Jorge Ralph Gallo Quintero, jointly and severally, the sum of $16,000,000. Plaintiff is awarded prejudgment interest, calculated in accordance with N.Y. CPLR 5001 and 5004 at the rate of 9% per annum from November 1, 2001 through January 3, 2006, in the amount of $6,012,493.15. Plaintiff also is awarded postjudgment interest to be calculated in accordance with 28 U.S.C. § 1961 at the rate of 4.36% (the weekly average one-year constant maturity Treasury yield for the week ending December 30, 2005), compounded annually, from the date of entry of this judgment until payment;

2. Ten days after entry of this Judgment, the account funds subject to the Court's Order of Attachment dated November 15, 2001 shall be transferred by granishee Citibank, N.A. to plaintiff

Banco Central de Paraguay, c/o Hughes Hubbard & Reed LLP Attorney Escrow Account, Citibank, ABA Number 021000089, 666 Fifth Avenue, 5th Floor, New York, New York 10103, Attn: Gail Mauceli, Account Number 09117491, to perfect the levy of the Order of Attachment pursuant to N.Y. CPLR 6214 and in partial satisfaction of this Judgment;

3. Upon the transfer of the funds set forth in paragraph 2 above, the Attachment Bond shall be deemed discharged and released and the Clerk of the Court shall return the original Attachment Bond to counsel for plaintiff Banco Central de Paraguay, c/o Hughes Hubbard & Reed LLP, Attn: Daniel H. Weiner, Esq., One Battery Park Plaza, New York, New York 10004-1492; and

4. The Court shall maintain jurisdiction of this action for the purpose of enforcing this Judgment.

Dated: New York, New York
January 3, 2006

/s/John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01 Civ. 9649 (JFK)

[Filed October 31, 2005]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

-against-

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants.

-and-

JOHN W. TULAC,

Nominal Defendant,

OPINION AND ORDER

Appearances:

For Plaintiff Banco Central de Paraguay and Third-party Defendants Banco Union S.A.E.C.A. and Banco Oriental S.A.I.F.E.C.A.

HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, New York 10004
Of Counsel: Daniel H. Weiner, Esq.

For Principal Defendants and Third-party Plaintiffs Paraguayan Humanitarian Fdn., CQZ Holding Corp., Avijos, Inc., Jose M. Avila, Ronald L. Wolfson and Jorge Ralph Gallo Quintero

CUBITT & CUBITT
186 East Huron Ave.
Bad Axe, Michigan 48413
Of Counsel: H. Dale Cubitt, Esq.

JOHN F. KEENAN, United States District Judge:

Plaintiff Banco Central de Paraguay ("Banco Central") moves to dismiss the Principal Defendants' counterclaim in this matter. Third-party defendants Banco Union S.A.E.C.A. in liquidation ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. in liquidation ("Banco Oriental") move to dismiss the Principal Defendants' third party complaint. For the reasons that follow, the motions are granted.

BACKGROUND

This case involves the diversion of $16 million from two insolvent Paraguayan banks, Banco Union and Banco Oriental, to Citibank trust accounts maintained by Nominal Defendant John W. Tulac and the Principal Defendants. Familiarity with the underlying facts is presumed. *See Banco Central de Paraguay v. Paraguayan Humanitarian Fdn.*, No. 01 Civ. 9649, 2005 WL 53271 at *1-4 (S.D.N.Y. Jan. 7, 2005). In Count One of its amended complaint, Banco Central alleged that the Principal Defendants and Tulac had converted the $16 million. On January 7, 2005, the Court granted Plaintiff's motion for summary judgment on this count as to the Principal Defendants, but not as to Tulac.

A. Counterclaim

The counterclaim alleges that in March 2000, the Principal Defendants reached an agreement with certain Paraguayan officials concerning "project financing" for Paraguay. (Countercl. ¶ 1). To this end, Banco Union transferred $2 million to a trust account at Citibank in New York maintained by Principal Defendant CQZ Holding Corporation. (*Id.*). Subsequently, the Paraguayan superintendent of banks, the president of Banco Central and representatives from the liquidated banks allegedly reached an agreement "to seek a form of 100% non-recourse project financing sponsored by the United States." (*Id.*). In April 2000, allegedly to this end, the two liquidated banks deposited $14 million into a Citibank trust account in New York as an initial equity reserve. (*Id.*). Principal Defendants further allege that on August 2, 2000, Banco Central

committed the sum of $114,152,088 in writing to Principal Defendant CQZ Humanitarian Foundation. (*Id.*). Project financing was supposedly "approved" in late 2000, but Principal Defendants claim that Banco Central never paid the funds and that they ultimately were blocked. (*Id.*). According to the Principal Defendants, the CQZ Humanitarian Foundation (later known as Principal Defendant Paraguayan Humanitarian Foundation) ("PHF") could not move forward with the Paraguayan project. (*Id.*).

Principal Defendants claim that they had "multiple contracts" with the two liquidated banks, and a written contractual commitment from Banco Central for equity in order to arrange the non-recourse project financing. (*Id.* ¶ 2). The Principal Defendants allege that the liquidated banks "impos[ed] unreasonable and impossible" conditions upon the use of their funds after the transfer, and that Banco Central "reneged" on its commitment and interfered with the contractual relations between PHF and the liquidated banks. (*Id.* ¶ 4). Defendants contend that they have sustained "compensatory and consequential damages" and that they are "entitled to a humongous and bodacious amount of punitive damages." (*Id.* ¶ 5, 8).[1]

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[1] While "humongous" means "very large," the Court never before has encountered a demand for a "bodacious" amount of punitive damages. According to the online *Oxford English Dictionary* (www.oed.com), in the nineteenth century, "bodacious" meant "complete," "thorough" or "arrant" (e.g. "Air ye turned a bodacious idjit, Skimp?"). Acknowledging that language evolves toward a state of perfection, the O.E.D. lexicographers also list a few late twentieth-century usages: e.g. "excellent" and "fabulous" ("Those bodacious dudes have an excellent time playing games with death."). The final O.E.D. definition is "sexually attractive," but

Banco Central moves to dismiss the counterclaim on three grounds. First, Banco Central argues that it brought suit in its capacity as the assignee of the two banks in liquidation, but that the Principal Defendants impermissibly have asserted claims against Banco Central in its regulatory capacity as the highest banking authority in Paraguay. Second, and related, Banco Central argues that the Foreign Sovereign Immunities Act ("FSIA") bars suit against it in its regulatory capacity. Third, Banco Central argues that the act of state doctrine bars the counterclaim. Principal Defendants respond that Banco Central alleged in the amended complaint that it was acting as the assignee of the liquidated banks, not solely as a regulator; thus, it is vulnerable to counterclaims and cannot hide behind the FSIA. Principal Defendants argue that the act of state doctrine is inapplicable because it only applies to public official acts by foreign sovereigns in their own territories, and because the doctrine has a commercial activity exception.

B. Third Party Complaint

The allegations in the Principal Defendants' third party complaint are nearly identical to those in the counterclaim. The only substantive differences are (i) the third party complaint is asserted against Banco Union and Banco Oriental, not Banco Central, and (ii) the third party complaint contains allegations against Citibank. These allegations are now moot because the

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that example will not be used in the main text because the Court prefers that its opinions not appeal to prurient interests. Suffice it to say that the Principal Defendants are looking for some Brobdingnagian punitive damages.

Principal Defendants discontinued the third party action as to Citibank with prejudice. (Dkt. # 70).

DISCUSSION

A. Rule 12(b)(6) Standards

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court's task is to assess the legal feasibility of the claim rather than to weigh the evidence that might be offered in support thereof. *See, e.g., Geisler v. Petrocelli*, 616 F.2d 636, 639 (2d Cir. 1980). Accordingly, the Court accepts the counterclaiming defendants' factual allegations as true and draws all reasonable inferences in their favor. *See Masefield AG v. Colonial Oil Industries*, No. 05 Civ. 2231(PKL), 2005 WL 2105542 at *2 (S.D.N.Y. Sept. 1, 2005). Plaintiffs' motion will be granted only if it appears beyond doubt that the defendants can prove no set of facts in support of their claim that would entitle them to relief. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993).

B. Counterclaim

Generally, under the "opposing party" requirement in Fed. R. Civ. P. 13, when a plaintiff commences an action in one capacity, the defendant may not assert a counterclaim against that plaintiff in a capacity different from that in which the plaintiff sued. *See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 885 (2d Cir. 1981); *Blanchard v. Katz*, 117 F.R.D. 527, 528 (S.D.N.Y. 1987); 3 Moore's Federal Practice § 1390[2][d] (3d ed. 2005). There are recognized exceptions to the rule, for instance "if the plaintiff has sued in a representative capacity but will

benefit individually from any recovery" or "if principles of equity and judicial economy support such a counterclaim." *Blanchard*, 117 F.R.D. at 528.

In the instant matter, the Principal Defendants contend that Banco Central may be sued in a counterclaim because it stands in the shoes of Banco Union and Banco Oriental. (Pr. Def. Mem. - Countercl. at 1). Banco Central contends that it brought this action as the banks' assignee and that Rule 13 bars counterclaims against it in its regulatory capacity. There can be little dispute that the Principal Defendants are counterclaiming against Banco Central in its regulatory capacity. The Principal Defendants' allegations pertain to project financing supported by the United States and a written commitment of over $114 million to CQZ Humanitarian Foundation (later PHF). Principal Defendants note that "[a]s the highest banking authority in Paraguay, [Banco Central] had power to enter into a commercial or financial transaction, as alleged in the counterclaim." (Pr. Def. Mem. - Countercl. at 1-2). This is a concession that the allegations in the counterclaim are addressed to Banco Central in its individual capacity as a regulator.

The next issue concerns the capacity in which Banco Central commenced the action. According to the amended complaint: "The Central Bank of Paraguay, acting as the highest banking authority in Paraguay and on behalf and as assignee of Banco Union and Banco Oriental, brings this action to recover the diverted funds." (Am. Compl. ¶ 1). The language elsewhere in the amended complaint is similar (*See, e.g.*, *id.* ¶¶ 6, 35). Banco Central's characterization of itself as the "highest banking authority in Paraguay" is merely a descriptive phrase that does not refer to

the capacity under which it brought suit. As the amended complaint repeatedly makes clear, Banco Central's authority to commence this action derives from its representative capacity as the assignee of Banco Union and Banco Oriental, not from its individual regulatory capacity.

The Court concludes that Banco Central commenced this action in its representative capacity and that Principal Defendants have counterclaimed against Banco Central in its individual regulatory capacity. Accordingly, even if the Court assumes the truth of the allegations in the counterclaim, dismissal is warranted under the Rule 13 "opposing party" requirement. The parties have not addressed the exceptions to the general rule noted on page 6, *supra*, but the Court finds them inapplicable in any event. There is no indication that Banco Central will benefit in its individual capacity from a recovery of the diverted funds. Furthermore, judicial economy will not be served by allowing the counterclaim because the Principal Defendants already have filed a third party complaint containing the same allegations as the counterclaim.

Finally, the counterclaim appears to seek a recovery against Banco Union and Banco Oriental, even though the only plaintiff in the action is Banco Central, acting as the assignee of the two banks. The Principal Defendants make no attempt to persuade the Court that the two banks are "opposing parties" for Rule 13 purposes and thus vulnerable to a counterclaim. In fact, Principal Defendants note that one of the reasons they filed the third-party action "was to provide assurance that the two small Banks were, in fact, a party to this action." (Prin. Def. Mem. -

Third Party Compl. at 3). The Court therefore finds that Banco Oriental and Banco Union are not opposing parties under Rule 13.

The Court need not address Banco Central's other arguments in support of dismissal. The Principal Defendants have not requested leave to replead the counterclaim under Fed. R. Civ. P. 13(f) and 15(a). Nevertheless, construing the counterclaim in the light most favorable to the Principal Defendants, the Court concludes that leave to replead should be denied as futile. *See Albany Ins. Co. v. Esses*, 831 F.2d 41, 45 (2d Cir. 1985), *abrogated on other grounds*, *United States v. Indelicato*, 865 F.2d 1370 (2d Cir. 1989). The counterclaim is dismissed with prejudice.

C. Third Party Complaint

Banco Central argues that the third party complaint fails on Rule 12(b)(6) grounds for various reasons and on Rule 4(m) grounds because the Principal Defendants failed to serve the complaint on Banco Union and Banco Oriental until over two and one-half years after filing it. On the service issue, the Principal Defendants respond that they served a copy of the Complaint on the law firm of Hughes Hubbard & Reed LLP, which represents Banco Central and which subsequently filed the motion to dismiss the third party complaint on behalf of Banco Union and Banco Oriental. The Principal Defendants also claim that the third party summons and complaint "were sent to Paraguay for service on the two smaller Banks individually" but "[t]o date, counsel . . . have not received a proof of service." (Pr. Def. Mem. - Third Party Compl. at 2). The Principal Defendants do not dispute that they waited over two and one-half years

after filing the third party complaint to attempt service of Banco Union and Banco Oriental.

Pursuant to Fed. R. Civ. P. 4(m), "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court . . . shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period." While Rule 4(m) does not apply to service in a foreign country, the plaintiff does not have an unlimited time to effect service. *See Yellowave Corp. v. Mana*, No. 00 Civ. 2267(SAS), 2000 WL 1508249 at *1-2 (S.D.N.Y. Oct. 11, 2000). "[W]here service is in a foreign country, the Court uses a flexible due diligence standard to determine whether service of process was timely." *Travers Tool Co. v. Southern Overseas Express Line, Inc.*, 98 Civ. 8464(RO), 2000 WL 194781 at *1 (S.D.N.Y. Feb. 17, 2000); *see also Montalbano v Easco Hand Tools, Inc.*, 766 F.2d 737, 740 (2d Cir. 1985) (applying the Rule 4(m) 120-day service requirement to service in a foreign country because plaintiff "ha[d] not exactly bent over backward to effect service").

The Court finds that the Principal Defendants have not properly served their third party complaint on Banco Union and Banco Oriental. Although the Principal Defendants note that the third-party summons and complaint were sent to Paraguay for personal service, they offer no explanation for the failure of service. Even under the most lenient standards, the Court concludes that Principal Defendants have not been diligent in attempting service on Banco Union and Banco Oriental. The

failure to effect service of process on Banco Union and Banco Oriental is a defect under Fed. R. Civ. P. 12(b)(5). As the Principal Defendants have not shown good cause for the failure of service, *see* Fed. R. Civ. P. 4(m), the Court dismisses the third party complaint without prejudice.

CONCLUSION

In light of the foregoing, Banco Central's motion to dismiss the Principal Defendant's counterclaim is granted. The counterclaim is dismissed with prejudice. Banco Union and Banco Oriental's motion to dismiss the Principal Defendants' third party complaint is granted. The third party complaint is dismissed without prejudice. The parties are directed to submit revised proposed judgments no later than November 10, 2005. Counsel shall appear at a status conference on November 22, 2005 at 11:00 a.m. in Courtroom 20C of the United States Courthouse, 500 Pearl Street, New York, New York.

SO ORDERED.

Dated: New York, New York
October 31, 2005

/s/John F. Keenan
John F. Keenan
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 01CIV9649 (JFK)(FM)

[Filed January 7, 2005]

BANCO CENTRAL DEL PARAGUAY, on behalf and as assignee of Banco Union S.A.E.C.A. in liquidation and Banco Oriental S.A.I.F.E.C.A. in liquidation,

Plaintiff,

v.

PARAGUAY HUMANITARIAN FOUNDATION, INC. f/k/a CQZ HUMANITARIAN FOUNDATION, INC., CQZ HOLDING CORP., AVIJOS, INC., JOSE M. AVILA, RONALD L. WOLFSON and JORGE RALPH GALLO QUINTERO,

Principal Defendants,

and

JOHN W. TULAC,

Nominal Defendant.

Hughes Hubbard & Reed LLP, New York, New York, Daniel H. Weiner, Nicholas Swerdloff, for Plaintiff, of counsel.

Cubitt & Cubitt, Bad Axe, Michigan, H. Dale Cubitt, for Principal Defendants, of counsel.

John W. Tulac (in propria persona), Claremont, California, for Nominal Defendant.

OPINION

KEENAN, J.

This dispute involves the diversion of $16 million from Banco Union S.A.E.C.A. ("Banco Union") and Banco Oriental S.A.I.F.E.C.A. ("Banco Oriental"), two Paraguayan banks in liquidation. During March and April of 2000, the funds were transferred to trust accounts maintained by Nominal Defendant John W. Tulac, Esq. ("Tulac") at Citibank in New York. Thereafter, $14 million of the $16 million was transferred to Citibank accounts maintained by Principal Defendant Paraguay Humanitarian Foundation ("PHF"), and over $1 million of the $16 million to other accounts maintained or controlled by Principal Defendants Avijos, Inc. ("Avijos"), Jose M. Avila ("Avila"), CQZ Holding Corp. ("CQZ Holding") and Nominal Defendant Tulac.

On November 1, 2001, Plaintiff Banco Central de Paraguay ("Banco Central"), claiming to be the assignee of the two liquidated banks, commenced this action to recover the $16 million. Banco Central alleges conversion and constructive trust claims against all defendants, and a conspiracy claim against

the principal defendants. On September 13, 2002, the principal defendants filed their answer, affirmative defenses, counterclaim and a now-discontinued third-party complaint against Citibank. Tulac simultaneously filed his answer and interpleader counterclaim. Upon leave of Magistrate Judge Maas, Banco Central filed an amended complaint adding principal defendants Ronald L. Wolfson ("Wolfson") and Jorge Ralph Gallo Quintero ("Quintero") on July 10, 2003. Principal Defendants have filed an answer to the amended complaint and amended affirmative defenses.

Four motions are now before the Court. Banco Central moves for summary judgment on Count One of its amended complaint, which alleges conversion of the $16 million against all defendants. The principal defendants move for summary judgment dismissing Banco Central's claims and awarding costs and attorney's fees. Tulac moves for judgment on the pleadings, or, alternatively, summary judgment, for discharge under the interpleader and dismissal of Banco Central's claims against him.

Background

Banco Central is the highest banking authority in Paraguay and has been characterized by one of its directors as "the Paraguyan equivalent of the Federal Reserve Bank." (Weiner Affid., Exh. Q, ¶ 3). Under Paraguayan law, one of Banco Central's duties is to supervise the liquidation of failed Paraguayan banks through the Superintendent of Banks of Paraguay ("Superintendent"). (*Id.*). The Superintendent appoints the liquidators and supervises the liquidation while reporting back to Banco Central. (*Id.*). There is some

dispute among the parties concerning Banco Central's role in this process. Banco Central claims that it supervises the liquidation through the Superintendent. (Pl. Rule 56.1 Stmt. in Support of Motion ¶¶ 1-2). Nominal defendant Tulac does not dispute the substance of this statement. (Tulac Resp. to Pl. Rule 56 .1 Stmt. ¶ 1). Principal defendants, however, claim that Banco Central is not the Federal Reserve equivalent and that the superintendent has the "full authority" over the liquidated banks. (Def. Ans. To Pl. Rule 56.1 Stmt. ¶¶ 1-2).

In 1998, Banco Central placed Banco Union and Banco Oriental in liquidation. In March 2000, the liquidators of the two banks, presumably appointed by the Superintendent, appointed Juan Fernando Rodriguez Leith ("Rodriguez Leith") power of attorney of Banco Union and Ramon Alberto Guillen Ortiz ("Guillen Ortiz") power of attorney of Banco Oriental. (Cubitt Affd., Exh. B & C). The duration of these appointments was until the termination of a so-called "Reserved Funds Investment Program," or until specified dates in April 2001, whichever occurred first. (Weiner Affd., Exh. Z). At some point, presumably before March 2000, Rodriguez Leith signed a pre-agreement to form a joint venture between the "CQZ Project Manager" and the "D.F.M. Foundation" for work on a "project management plan in Paraguay" and other South and Central American countries. (Cubitt Affd., Exh. F). This pre-agreement was signed by Rodriguez Leith, defendant Quintero (a director and officer of defendant CQZ Holding Corp.), defendant Avila (a director and officer of defendant Avijos), and Julio Gonzalez Ugarte ("Gonzalez Ugarte"). Gonzalez Ugarte was a member of the Banco Central board of directors.

On March 13, 2000, Rodriguez Leith, acting on behalf of both banks, signed a letter of intent directed to Quintero referencing the placement of the $16 million in a Paraguayan humanitarian project. (Weiner Affd., Exh. G).[1] The next day, Rodriguez Leith and Quintero apparently entered into a "Joint Venture" referencing the $16 million placement. (*Id.* at Exh. H).[2] This Joint Venture provides that "in the event that the investment plan is not carried out, instruments deposited in the form of cash and/or demand draft shall be reimbursed without suffering damage or loss of value for any reason whatsoever."(*Id.* ¶ 5).

Soon after the execution of the letter of intent and Joint Venture, the transfers of funds at issue in this dispute occurred. On March 17, 2000, $2 million was transferred from Banco Union to a Citibank trust account in the name of "CQZ Holding Project Trust." ("CQZ Trust Account"). On April 11, 2000, $6.1 million was transferred from Banco Union to another Citibank trust account maintained by nominal defendant Tulac ("Trust Account"). The same day, $7.9 million was transferred from Banco Oriental to the Trust Account. Later in the year, $14 million was transferred from the Trust Account to accounts maintained by PHF at

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[1] According to the principal defendants, Guillen Ortiz transferred authority to act on behalf of Banco Union to Rodriguez Leith. Defendants submit a document that appears to memorialize the transfer, but the document is in Spanish with no translation. (Cubitt Affd., Exh. C)

[2] In the copy of the Joint Venture submitted to the Court, Quintero's signature does not appear above his signature line. (Weiner Affd., Exh. H).

Citibank. Over $1 million was transferred from the CQZ Trust Account to other accounts maintained or controlled by Avijos, Avila (the president of Avijos and secretary of PHF), CQZ Holding and Nominal Defendant Tulac. (Pl. Rule 56.1 Stmt. in Support of Motion ¶ 3).

On June 28, 2000, Rodriguez Leith sent a "Donation Letter" addressed to "CQZ Humanitarian Foundation" (the former name of defendant PHF), which the letter defined as "a United States charitable organization formed to fund humanitarian projects in Paraguay and possibly other South American and Central American nations." (Cubitt Affd., Exh. G). Rodriguez Leith extended a "contribution" of $4 million and a "no-interest" loan of $10 million to the CQZ Humanitarian Foundation for feasibility studies, a proposed hospital project and infrastructure development in Paraguay. (*Id.*). On June 29, 2000, Rodriguez Leith and the CQZ Humanitarian Foundation (PHF) executed the $10 million loan agreement. (*Id.*). It appears the transfer of $14 million of the $16 million from the Trust Account to the Citibank accounts maintained by PHF occurred on the same day as the execution of the loan agreement. (*Id.*, Amended Cmplt. ¶ 22). On October 19, 2000, Rodriguez Leith wrote PHF and informed the directors that the parties responsible for the $10 million loan wished to cancel the note and contribute the money to PHF. (Cubitt Affd., Exh. I)

Also occurring in 2000 was the issuance of two checks by defendant Avijos (Avila's company). (Weiner Affd., Exh. J-K). The first, for $2 million, was dated March 13, 2000 and made payable to Banco Union. This check was dated on the same day that Quintero

and Rodriguez Leith signed the letter of intent and four days before the $2 million transfer from Banco Union. The second check, for $14 million, was dated October 19, 2000 and made payable to Rodriguez Leith. Avijos's account did not, and still does not, have sufficient funds to cover these checks. (Weiner Affd., Exh. L). Defendants claim that the giving of a check (presumably even those that bounce as high as a Baltimore chop) in South America and elsewhere signifies the giving of a guaranty, even though "this is not the way we do things in the U.S." (Def. Ans. to Pl. 56.1 Stmt. ¶ 4).

In January 2001, the Paraguayan press reported that $16 million was missing from Banco Union and Banco Oriental. Soon thereafter, the liquidators of the banks were replaced. Plaintiffs allege that Avila, working in concert with Ugarte, then concocted phony guarantees issued by ABN-AMRO Bank ("ABN") in favor of Banco Union and Banco Oriental. Defendants emphasize that the phony ABN guarantees actually were provided by Banco Central. (Def. Reply Mem. in Support at 3). In their depositions, both Avila and Tulac testified that Ugarte appeared to be the brains behind the guarantees. (Weiner Affd., Exh. A at 131-46; Exh. D at 353-55). Avijos (Avila's company) sent contracts to the new liquidators pursuant to which Avijos would purchase the guarantees from Banco Union and Banco Oriental, thereby providing an avenue for returning the $16 million. It appears that Avila, on behalf of Avijos, entered into the contracts with the liquidators on March 16, 2001. (Cubitt Affd., Exh. J, K). Principal defendants submitted these contracts as part of their opposition papers to Banco Central's summary judgment motions, but failed to submit English translations of the documents.

On April 13, 2001, Tulac sent a letter to the new liquidators in which he informed them that "[p]ursuant to a written agreement between each bank and Avijos, Inc., the banks were guaranteed repayment of a liquidated amount, including principal and all accrued interest." (Weiner Affd., Exh. N). Tulac stated that he was "instructed to settle these two contracts" and that once the banks were paid in full, they would "no longer be a part of the project development." (*Id.*). On April 27, 2001, Tulac wrote to Citibank in Paraguay to ask for information necessary to send payments to Banco Union and Banco Oriental "in settlement of their contracts with Avijos." (*Id.*, Exh. P.). On May 1, 2001, the Banco Union liquidator acknowledged receipt of an April 30, 2001 letter from Tulac that discussed "the probable sending of the funds that were transferred to [Tulac's] account at Citibank." (*Id.*, Exh. O).[3] The Banco Union liquidator requested an exact date for the transfer. (*Id.*). The transfer was never made.

On September 10, 2001, in separate documents, Banco Union and Banco Oriental assigned all their rights and claims in connection with the diverted funds to Banco Central. (Weiner Affd., Exh. R). Defendants claim that these assignments are invalid because they were not notarized in accordance with Paraguayan law. (Def. Mem. in Support at 6-7). On November 1, 2001, Banco Central commenced this action. On November 15, 2001, the Court entered an order of attachment of the nearly $14.1 million in the Citibank trust accounts. These funds remain frozen pursuant to the Court's order.

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[3] This April 30, 2001 letter does not appear in the record.

In November 2001, new liquidators were appointed. In January 2004, these liquidators, on behalf of Banco Union and Banco Oriental, executed ratifications of the assignments to Banco Central and submitted declarations to the Court fully supporting the prosecution of this action by Banco Central. (Swerdloff Affd., Exh. A-B).

Discussion

I. Legal Standards

Banco Central and the principal defendants have submitted motions for summary judgment. Tulac has submitted alternative motions for judgment on the pleadings or summary judgment. The latter motion includes a declaration by Tulac and two exhibits not attached to, or incorporated in, the pleadings. In his reply papers, Tulac refers to his declaration and to the exhibits in support of contentions appearing in the Rule 12(c) motion (Tulac's Reply Brief, dated Feb. 19, 2004, at 3-4). Because Tulac has presented, and relied upon, material outside the pleadings, the Court will treat his alternative motions as one motion for summary judgment under Rule 56. *See Sira v. Morton*, 380 F.3d 57, 66 (2d Cir. 2004).

The Court may grant summary judgment only if the moving party is entitled to judgment as a matter of law because there is no genuine dispute as to any material fact. *See Silver v. City Univ. of New York*, 947 F.2d 1021, 1022 (2d Cir. 1991); *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). The role of the Court on such a motion "is not to resolve disputed issues of fact but to assess whether

there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight,* 804 F.2d at 11; *see also First Fed. Sav. & Loan Ass'n,* 869 F.2d at 103 (stating that to resolve a summary judgment motion properly, a court must conclude that there are no genuine issues of material fact, and that all inferences must be drawn in favor of the non-moving party).

The movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions to file, together with affidavits, if any," that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). If the movant meets this initial burden, the party opposing the motion must then demonstrate that there exists a genuine dispute as to the material facts. *See id.; Silver,* 947 F.2d at 1022.

The opposing party may not solely rely on its pleadings, on conclusory factual allegations, or on conjecture as to the facts that discovery might disclose. *See Gray v. Town of Darien,* 927 F.2d 69, 74 (2d Cir. 1991). Rather, the opposing party must present specific evidence supporting its contention that there is a genuine material issue of fact. *See Celotex Corp.,* 477 U.S. at 324; *Twin Labs. Inc. v. Weider Health & Fitness,* 900 F.2d 566, 568 (2d Cir. 1990). To show such a "genuine dispute," the opposing party must come forward with enough evidence to allow a reasonable jury to return a verdict in its favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-87 (1986); *Cinema North Corp. v. Plaza at Latham Assocs.,* 867 F.2d 135, 138 (2d Cir. 1989). If

"the party opposing summary judgment propounds a reasonable conflicting interpretation of a material disputed fact," then summary judgment must be denied. *Schering Corp. v. Home Insur. Co.*, 712 F.2d 4, 9-10 (2d Cir. 1983).

II. Banco Central's Motion

Banco Central has moved for summary judgment on its conversion claim, which is Count One of the Amended Complaint. In order to state a cause of action for conversion, "a plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant's exercise of dominion over or interference with the property in defiance of the plaintiff's rights." *Di Siena v. Di Siena*, 266 A.D.2d 673, 674, 698 N.Y.S.2d 93, 95 (3d Dep't 1999)." Wrongful intent is unnecessary. All that the owner need show is that he has been deprived of his property by the defendant's unauthorized exercise of dominion and control over it." *Filner v. Shapiro*, 633 F.2d 139, 141-42 (2d Cir. 1980). A limitation is that "[a] cause of action for conversion cannot be predicated on a mere breach of contract." *Fesseha v. TD Waterhouse Investor Services, Inc.*, 305 A.D.2d 268, 269, 761 N.Y.S.2d 22, 24 (1st Dep't 2003).

Banco Central alleges that it has the superior right of possession to the $16 million. Banco Central initiated this lawsuit pursuant to assignments of rights from Banco Union and Banco Oriental on September 10, 2001. The new liquidators ratified these assignments in January 2004. Furthermore, Banco Central contends, defendants have admitted that the liquidated banks were entitled to the return of the money. For example, Avila testified at his deposition:

Q: So they never got their money back because the Paraguay Humanitarian Foundation wants to do this project in Paraguay. Is that what you're telling me?

A: No. We are going to return the whole amount of money with or without the project, in Paraguay.

(Weiner Affd., Exh. A at 129). Quintero also testified to the same effect at his deposition:

Q: So am I correct in understanding that the intention was that the money would be returned to the two Paraguayan banks without the loss of any value?

A: Yes.

...

Q: When you said you wanted him [Tulac] to make settlement arrangements for making settlement with the two banks, did you mean to return the $16,000,000?

A: To set up so we could give them assistance so they can get the $16,000,000 back plus interest.

(*Id.*, Exh. C at 80, 102). Nominal defendant Tulac added another variation on this theme with respect to the funds transferred to a PHF trust account:

Q: So there would be no disbursements for the 14 million

A: There would be no disbursements from there. It was ultimately contemplated the 14 million would be disbursed back.

Q: To Paraguay?

A: To Paraguay.

(*Id.*, Exh. D at 167-68).

Banco Central also alleges that the defendants failed to return the money upon demand, even though the money resided in trust accounts under defendants' control. Consequently, Banco Central argues, summary judgment on its conversion claim is warranted.

The principal defendants attempt to stave off summary judgment with several arguments that attempt to generate a dispute of fact. First the defendants attack the assignments, both here and in their own motion for summary judgment, by challenging their validity under Paraguayan law. (Pr. Def. Mem. in Support at 5; Pr. Def. Rep. Mem. at 4; Pr. Def. Mem. in Opp. at 4). Defendants cite a June 2002 emailed "Memorando" (in Spanish) from Alfredo Kronawetter, who is purportedly an attorney in Paraguay. (Pr. Def. Mem. in Support at Exh. E). This memorandum is accompanied by an unsigned, undated, and uncertified English translation. First, the Memorando is hearsay that would be inadmissible at trial. Second, even a ninth-grader in the first month of Spanish 101 can see that the translation bears no resemblance to any portion of the Memorando. The translation discusses the notarization of certain documents. The Memorando appears to discuss the jurisdiction of the Paraguayan courts, and who has the ultimate authority to act on behalf of banks in liquidation. The Court therefore disregards this

evidence and rejects principal defendants' argument that the assignment were invalid.[4]

Principal defendants also argue that "the liquidators of the two banks, the power of attorney for the two banks, the president and director and several other directors of [Banco Central] were all involved from the beginning." (Pr. Def. Mem. in Opp. at 2). While this statement is highly general, it is clear from the submitted papers that Banco Union power of attorney Rodriguez Leith, purportedly acting on behalf of both banks, was highly involved in the transfers. Gonzalez Ugarte, a director on Banco Central's board, also had some involvement, judging from his execution of the Pre-Agreement.

Even if the Court gives the non-movant defendants the benefit of the doubt and assumes *arguendo* that their initial possession of the $16,000,000 was proper, it is hornbook law that when the dispossessed party makes a demand on his goods, an absolute and unqualified refusal to surrender the goods constitutes conversion. *Prosser and Keeton on the Law of Torts* 99 (5th ed. 1984); *see, e.g., Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993) ("Where the original possession is lawful, a conversion does not occur until defendant refuses to return the property after demand or until he sooner disposes of the property."). Banco Central's action for conversion gives notice of an adverse claim to the $16,000,000 and

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[4] Principal Defendants sent a declaration by Mr. Kronawetter to the Court on May 24, 2004 (this time with a proper English translation) that makes the same statement with regard to notarization. This declaration was submitted over four months after the close of briefing and will not be considered.

fulfills the demand requirement. *See Chemical Bank v. Soc'y Brand Indus., Inc.*, 624 F. Supp. 979, 983 (S.D.N.Y. 1985). Defendants' general assertions concerning the involvement of Ugarte and the liquidators do not change this analysis.

Principal Defendants next contend that Avijos has assumed responsibility for the funds and owes Banco Central the $16,000,000. Defendants contend that Avijos assumed this responsibility by way of fraudulent checks for $2,000,000 and $14,000,000. Defendants' (unsubstantiated) argument bears repeating: "Although this is not the way we do things in the U.S., it is common in South America and elsewhere in the world to give your check as your guarantee." (Pr. Def. Mem. in Opp. at 2). This argument is far-fetched in the extreme.

In the next sentence of their brief, Principal defendants contend that Rodriguez Leith, on behalf of the banks, "gifted" the $16,000,000 to PHF. (*Id.* at 2-3). Principal defendants refer to Rodriguez Leith's $4,000,000 contribution and $10,000,000 loan that later became a contribution itself. (Cubitt Affd. at Exh. G, I). This argument is also without merit. A gift requires donative intent. *Muserlian v. C.I.R.*, 932 F.2d 109, 113 (2d Cir. 1991). Defendants conceded repeatedly on deposition that the banks were entitled to the return of the $16,000,000. Furthermore, the Joint Venture between Rodriguez Leith (on behalf of the banks) and Quintero (on behalf of CQZ Holding Trust) makes clear that the money must be "reimbursed" to the banks if the investment plan was not carried out. (Weiner Affd., Exh. H). There was no "gift."

The Court has considered the Principal defendants' remaining arguments and finds them unsubstantiated and therefore without merit. In fact, Principal Defendants' papers contain very few citations to the record. Far more often than not, Principal defendants merely make conclusory "pound the table" statements with no evidentiary support whatsoever. Plaintiffs' motion for summary judgment on Count I of its Amended Complaint is therefore granted with respect to the Principal Defendants.

Nominal defendant Tulac, who held the trust accounts at Citibank that housed the $16,000,000, fares better than his co-defendants because Banco Central's motion papers in support of summary judgment barely discuss his role. Banco Central merely rebuts his arguments against conversion in their reply papers. This is not enough for summary judgment with respect to him. Tulac has produced the Trust Agreements that state that he "has no knowledge of or participation in any investment program arranged by [CQZ Holding Corp.]." His receipt of monies into the trust account was pursuant to this agreement. While there is no doubt that Tulac wrote letters in April 2001 purporting to arrange for a reimbursement of funds that never took place, Banco Central points to no clear evidence in its moving papers that Tulac acted outside the scope of the trust agreements. The motion for summary judgment on Count I of the Amended Complaint is denied with respect to Tulac.

III. Principal Defendants' Motion

The principal defendants have moved for summary judgment on all three counts on Banco Central's Amended Complaint. Obviously, the motion on Count I is denied because the Court has already granted summary judgment to Banco Central as against the principal defendants on this Count. The motions on Counts II and III are also denied.

The principal defendants' motion is fatally flawed by its noncompliance with Local Rule 56.1 of this District's Local Civil Rules. According to Rule 56.1(a), "there shall be annexed to the notice of motion a separate, short and concise statement, *in numbered paragraphs,* of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement may constitute grounds for denial of the motion." The principal defendants submitted no statement at all until the reply papers stage-a clear violation of the Rule. The Court will overlook this failing because of its broad discretion to excuse violations of the local rules. *See Wight v. Bankamerica Corp.*, 219 F.3d 79, 85 (2d Cir. 2000). On the other hand, the submitted statement contains a flaw that the Court *cannot* overlook.

Rule 56.1(d) provides that "[e]ach statement *by the movant or opponent pursuant to Rule 56.1(a) and (b)...* must be followed by citation to evidence which would be admissible, set forth as required by Federal Rule of Civil Procedure 56(e)." As previously discussed, Principal Defendant's papers are notable for their lack of citations. Principal Defendant's Rule 56.1 statement contains only three cited sentences in fifteen

paragraphs-and the citations are to one declaration by defendant Avila. This six-paragraph declaration states that Avila attended a meeting with Ugarte, Rodriguez Leith, and Guillen Ortiz in 2000, that he gave the two checks "in accordance with South American customs" and that Avijos has entered into a contract with Banco Union and Banco Oriental stipulating that jurisdiction over this matter was in Paraguay.

The jurisdiction issue appears in Principal Defendants' papers from time to time, but it is a nonstarter. This is a tort action, not a contract action. While it is true that an action in conversion will not lie for a mere breach of contract, the plaintiff may bring a conversion claim when the breach "result[s] in some 'wrong' that is separately actionable." *Wechsler v. Hunt Health Systs., Ltd.*, 330 F.Supp.2d 383, 431-432 (S.D.N.Y. 2004). Banco Central has chosen to sue in tort, and a contract with Banco Union and Banco Oriental that provides for jurisdiction in Paraguay does not govern Banco Central's conversion claims. Principal Defendants indeed submitted these contracts as exhibits to their opposition papers. Unfortunately, the contracts are in Spanish, and Principal Defendants neglected to provide translations.

The point of Local Rules such as Rule 56.1(d) is to compel the movant to "specif[y] the material facts and direct[ ] the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his statement." *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-51 (D.C. Cir. 1996). The Court's role is not to wander aimlessly through the record in search of evidence that substantiates the allegations in the Rule 56.1 statement. When the movant is

responsible for forcing the Court into this role, the Court is completely justified in denying the motion in its entirety. Principal defendants' motion is denied.

IV. Tulac's Motion for Summary Judgment

Tulac's Rule 56.1 statement, which is titled "Statement of Undisputed Facts"-while properly submitted with the initial moving papers-suffers from the same debilitating failing as the principal defendant's statement. With the exception of the fourth paragraph, none of the eight paragraphs in the statement contain citations to the record. The only citations are to letters issued by Citibank in May 2002 that terminated Tulac's accounts and instructed him to conduct his banking business elsewhere. (Tulac Notice of Motion, Exh. 1-2). Banco Central, by contrast, makes a number (cited) assertions of fact in its Rule 56.1 Statement in Opposition. These facts at least permit an inference that Tulac had some role in the diversion. Tulac's motion for summary judgment, which incorporates his motion for judgment on the pleadings, is denied.

V. Conclusion

Banco Central's motion for summary judgment on Count I of its Amended Complaint is granted as to the principal defendants and denied as to nominal defendant Tulac. The remaining motions are denied.

Banco Central is directed to settle a judgment consistent with this decision on seven days' notice to the principal defendants. If the parties cannot agree on a judgment, they shall submit proposed judgments to the Court no later than February 1, 2005.

The parties are directed to appear at a conference on March 8, 2005 at 9:45 a.m. in order to discuss any issues remaining in this action.

SO ORDERED.

APPENDIX G

Federal Rules of Civil Procedure
Rule 4. Summons

(a) Contents; Amendments.

(1) Contents.

A summons must:

(A) name the court and the parties;

(B) be directed to the defendant;

(C) state the name and address of the plaintiff's attorney or—if unrepresented—of the plaintiff;

(D) state the time within which the defendant must appear and defend;

(E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint;

(F) be signed by the clerk; and

(G) bear the court's seal.

(2) Amendments.

The court may permit a summons to be amended.

(b) Issuance.

On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons—or a copy of a summons that is addressed to multiple defendants—must be issued for each defendant to be served.

(c) Service.

(1) In General.

A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom.

Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed.

At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiving Service.

(1) Requesting a Waiver.

An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form;

(D) inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive.

If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver.

A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver.

When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived.

Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

(e) Serving an Individual Within a Judicial District of the United States.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

(f) Serving an Individual in a Foreign Country.

Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;

(B) as the foreign authority directs in response to a letter rogatory or letter of request; or

(C) unless prohibited by the foreign country's law, by:

(i) delivering a copy of the summons and of the complaint to the individual personally; or

(ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or

(3) by other means not prohibited by international agreement, as the court orders.

(g) Serving a Minor or an Incompetent Person.

A minor or an incompetent person in a judicial district of the United States must be served by following state law for serving a summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person who is not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Serving a Corporation, Partnership, or Association.

Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by

appointment or by law to receive service of process and—if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) United States.

To serve the United States, a party must:

(A)

(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought—or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk—or

(ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) Agency; Corporation; Officer or Employee Sued in an Official Capacity.

To serve a United States agency or corporation, or a United States officer or employee sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) Officer or Employee Sued Individually.

To serve a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) Extending Time.

The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served the United States officer or employee.

(j) Serving a Foreign, State, or Local Government.

(1) Foreign State.

A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608.

(2) State or Local Government. A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by:

(A) delivering a copy of the summons and of the complaint to its chief executive officer; or

(B) serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.

(k) Territorial Limits of Effective Service.

(1) In General.

Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction.

For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

(l) Proving Service.

(1) Affidavit Required.

Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit.

(2) Service Outside the United States.

Service not within any judicial district of the United States must be proved as follows:

(A) if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or

(B) if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee.

(3) Validity of Service; Amending Proof. Failure to prove service does not affect the validity of service. The court may permit proof of service to be amended.

(m) Time Limit for Service.

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

(n) Asserting Jurisdiction over Property or Assets.

(1) Federal Law.

The court may assert jurisdiction over property if authorized by a federal statute. Notice to claimants of the property must be given as provided in the statute or by serving a summons under this rule.

(2) State Law.

On a showing that personal jurisdiction over a defendant cannot be obtained in the district where

the action is brought by reasonable efforts to serve a summons under this rule, the court may assert jurisdiction over the defendant's assets found in the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.